IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
FILE NO. 1:13-CV-00304-MR-DLH

HOMETOWN SERVICES, INC.	)
Plaintiff,	)
	)
v.	)
	)
EQUITYLOCK SOLUTIONS, INC.,	)
Defendant.	)

REPLY BRIEF

NOW COMES Defendant EquityLock, by and through counsel, and replies to Plaintiff's Objections to Magistrate Judge's Memorandum and Recommendation as follows:

Standard of Review

Under the Federal Magistrate Act, a district court makes "a *de novo* determination of those portions of the report or specific proposed findings or recommendations to which objection is made." Lawhead v. PNC Bank, 2014 U.S. Dist. LEXIS 40082 (W.D.N.C. 2014). "In order 'to preserve for appeal an issue in a magistrate judge's report, a party must object to the finding or recommendation on that issue with sufficient specificity so as to reasonably alert the district court of the true ground for the objection.'" Id.

Argument

1. The Memorandum and Recommendation correctly concluded that "Plaintiff failed to submit the claim to mediation, as required by the express terms of the Joint Venture Agreement." [Doc. 21 at 6].

The record is clear that Plaintiff never made a demand for mediation before filing the lawsuit. Instead, Plaintiff simply sent a letter stating that the Joint Venture Agreement requires "the parties to spend the next 30 days working earnestly and in good faith to reach a resolution prior to commencing mediation in Buncombe County[.]" [Doc. 16 at 3, Emphasis added]. Plaintiff's letter indicates that the next step was a demand for mediation, not the filing of a lawsuit, yet there is no allegation in the Complaint that Plaintiff demanded mediation before filing suit, nor any allegation that EquityLock refused to participate in mediation. As such, Magistrate Judge Howell's determination that Plaintiff failed to submit the claim to mediation was correct and should be affirmed.

2. The Memorandum and Recommendation correctly recommended dismissal without prejudice for the failure to mediate this dispute before filing suit.

When the parties to a contract agree to mediate a dispute before filing suit, the court has the authority to dismiss the action if the parties have failed to mediate. Tatoo Art, Inc. v. TAT Int'l, LLC, 711 F. Supp. 645, 651 (E.D.Va. 2010) ([F]ailure to mediate a dispute pursuant to a contract that makes mediation a condition precedent to filing a lawsuit warrants dismissal."); Dominion

Transmission, Inc. v. Precision Pipeline, 2013 U.S. Dist. LEXIS 159164 (E.D.Va. 2013). Plaintiff's reliance on N-Tron Corp. v. Rockwell Automation, Inc., 2010 U.S. Dist. LEXIS 14130 (S.D. Ala. 2010) does not alter that result. Indeed, the Court in N-Tron stated that "district courts are vested with discretion to determine whether stay or dismissal is appropriate." Id. at *31. The Magistrate Judge's recommendation to dismiss this action without prejudice was based on a determination that it would be "the more efficient means of handling the proceedings." [Doc. 21 at fn1]. That determination was well within the Magistrate Judge's discretion and should be affirmed.

Respectfully submitted this 15th day of May 2014.

/s/ Wyatt S. Stevens
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CERTIFICATE OF SERVICE

This is to certify that the foregoing Reply was served on Plaintiff via the Court's CM/ECF system on May 15, 2014.

This the 15th day of May 2014.

/s/ Wyatt Stevens